



COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 1974CV00070WENDY SWOLINZKY d/b/a BOOKABOAT,
Plaintiff,

VS.

TOWN OF AQUINNAH and
AQUINNAH BOARD OF SELECTMEN,
Defendants.FILED
SUPERIOR COURT
COUNTY OF DUKES COUNTY

JUL 23 2019

REC'D

CLERK

COMPLAINT AND JURY DEMAND

INTRODUCTION

Plaintiff, Wendy Swolinzky, (hereinafter "Swolinzky") brings this Complaint, pursuant to M.G.L. c. 79, § 10 & 14, as well as, the Massachusetts Declaration of Rights Article(s) 10, 11, 12, 14, for an assessment of damages arising out of the Defendants' wrongful taking of the Plaintiff's property without just compensation. Pursuant to M.G.L. c. 79, § 34 and related statutes, the Plaintiffs request that this Court grant a speedy trial on the assessment of damages for the unlawful taking of the property in question more fully described and referred to in this complaint as the "shack." In essence, Ms. Swolinzky contends that she owns the "shack" because she purchased it from its previous owner, one Camille Rose, who sold the "shack" as the lawfully appointed Executrix of Alfred Vanderhoop's will, the owner in predecessor.

The Town of Aquinnah has asserted ownership over the land on which this "shack" in question sits by virtue of the deed from the Commonwealth, but has never asserted ownership or made repairs to the "shack" or others similarly situated in the Menemsha Creek area. Essentially, the Plaintiff avers that the Defendant Town of Aquinnah wrongfully and illegally took the shack allegedly as "Town property" and has otherwise, failed, and or refused to make the Plaintiff whole for the fair market value of her property, as well as the economic benefit she would have been entitled to, but for the wrongful taking by the Defendant Town of Aquinnah.

JURY CLAIM

Pursuant to M.G.L. c. 79, § 22, and the Massachusetts Declaration of Rights Articles 10, 11, 14 and 15, Plaintiff demands a trial by jury on all issues, and requests that the jury have an opportunity to view the premises at issue.

PARTIES

1. Plaintiff Wendy Swolinzky, hereinafter "Ms. Swolinzky" or "Plaintiff", resides in Dukes County, 4 Beachrose Way, P.O. Box 634, Aquinnah, MA 02535.
2. For the period of 19 years preceding this complaint, Plaintiff has conducted an annual/seasonal boat renting business called "Book-A-Boat," located on land initially owned by both the Towns of Aquinnah and Chilmark. The Towns have recently agreed to revise the geographical border of the Town so that the entirety of the land now lies exclusively within the Town of Aquinnah.
3. Defendant Town of Aquinnah, is a municipality duly incorporated under the laws of the Commonwealth of Massachusetts.

FACTS

4. At all relevant times, Ms. Swolinzky has operated a seasonal boat and kayak rental business, known as "Book-A-Boat, off of land leased to her by the Town of Aquinnah.
5. The land that Ms. Swolinzky leases from the Town of Aquinnah is known as "Lot B," which is a waterfront property on Menemsha Creek within the Town of Aquinnah.
6. Ms. Swolinzky's lease for Lot B previously had a term of July 1, 2012, through June 30, 2017, but during the lease period Ms. Swolinzky and all other leaseholders executed a new lease, which has a current term of July 1, 2015, through June 30, 2020.
7. Camille Rose, a friend of Ms. Swolinzky, held a separate lease from the Town of Aquinnah to the adjacent "Lot A" through June 30, 2013.
8. Alfred Vanderhoop was the leaseholder to Lot A prior to Camille Rose's lease agreement with the Town. Mr. Vanderhoop and Camille Rose shared a long-term personal relationship.
9. A small fishing shack ("the shack") originally owned by Captain Stephen S. Gardiner sits on Lot A and abuts Lot B where Ms. Swolinzky's Book-A-Boat business is operated. The shack has stood on what is referred to Lot A for a period of time of approximately 100 years.
10. On May 14, 1992, Alfred Vanderhoop bequeathed to the Alfred A. Vanderhoop Educational Trust (the "Trust") "my shack located on the creek or southerly side of Menemsha Harbor basin upon the condition that the same be auctioned or sold in a commercially reasonable manner and the proceeds of the same fund the Educational Trust I have created." (Emphasis added.)

11. Camille Rose, who was Alfred Vanderhoop's partner, was named the executrix of Mr. Vanderhoop's last will and testament. The Trustees¹ of the Vanderhoop Educational Trust contested Ms. Rose's right to sell the shack in Probate and Family Court. The Trustees both executed the Trust Agreement and filed their lawsuit within days after the Town of Aquinnah's Board of Selectmen rescinded their vote to award Ms. Swolinzky the lease to Lot A where the "shack" currently sits.
12. In January of 2014, the parties to the Probate lawsuit agreed that, "for purposes of the Probate of the Estate of Alfred A. Vanderhoop, the Trust acknowledges the authority of Camille Rose, as Personal Representative of the Estate, to sell the Shack and waives any claim to the sale proceeds or challenge to the Bill of Sale."
13. From approximately 2006 through 2013, with the Town's knowledge and Ms. Rose's permission, Ms. Swolinzky openly conducted her business from the "shack" on Lot A while she was the lessee of Lot B. The Aquinnah Board of Selectmen and the small community of Menemsha lessees were fully aware that Ms. Swolinzky conducted her Book-A-Boat business from the "shack" owned by Camille Rose. A major portion of the "shack" itself was originally located within the Town of Chilmark and the remainder of the shack lies within the borders of the Town of Aquinnah.
14. On or about December 5, 2012, the Town of Aquinnah wrote to Ms. Rose to inform her that the Town would not renew her lease for Lot A when it expired on June 30, 2013 because she had allegedly violated the sections of the lease that required the operation of a business on the premises and prohibited the shared usage of lots.
15. There is a provision in all Town of Aquinnah leases of the waterfront Menemsha lots prohibiting the subletting of lots or shared usage, however the Town had neither employed nor enforced these provisions on any of lessee's lots until December 2012, when the provision was used as a reason not to renew the Lease of Lot A, held by Camille Rose and not any of the other lessee's who were also sharing their lots.
16. The BOS initially stated their intention not to renew Camille Rose's lease of Lot A purportedly because she was unable to demonstrate that she intended to use the property for purposes permitted by the lease as a "bait and tackle business. The BOS subsequently attempted to add use the "shared usage" exclusion as the basis for ending Ms. Rose's lease.
17. The Town of Aquinnah also requested that Ms. Rose inform the Town of her "plans to move the (shack) off the lot," and stated that if the shack was "not moved by July 1, 2013, (the Town of Aquinnah) will be forced to have it removed."
18. At the relevant times in 2013, the Aquinnah Board of Selectmen was a three-member Board comprised of James Newman, Spencer Booker, and Beverly Wright.

¹ Berta Welch was one of three Trustees who challenged Ms. Rose's right to dispose of the shack in Probate Court. Berta Welch is the wife of Vernon Welch who was awarded the lease to Lot A where the "shack" is located.

19. At the December 18, 2012, Aquinnah Board of Selectmen meeting the Board members discussed the possibility of purchasing the "shack" situated on Lot A from Camille Rose. The BOS directed Aquinnah Town Administrator Adam Wilson (hereinafter "Wilson") to contact Ms. Rose to determine if she was interested in the sale of the "shack" to the Town as an option to Ms. Rose "having to remove it."

20. On January 8, 2013, Ms. Rose responded to the BOS as follows:

"Your offer to buy my building in Menemsha is appreciated but I have promised to sell it to Wendy Swolinzky (sic) in the event that I can no longer use it.

21. On January 8, 2013, Ms. Swolinzky appeared before the Board of Selectmen to present her business plan and to discuss Lots A and B and her use of the shack located on Lot A. At the meeting, the Town was formally notified by letter that Ms. Rose would not sell the shack to the Town, but intended to sell the shack to the Plaintiff, Ms. Swolinzky.

22. During the course of this meeting, Board member James Newman proposed that Ms. Swolinzky swap lots (from Lot B to Lot A) when Ms. Rose's lease expired in order for Ms. Swolinzky to continue to use the shack on Lot A for her Book-A-Boat business.

23. The Board of Selectmen all stated they thought Ms. Swolinzky's proposal was "a good one," a "good solution" and took the proposal under advisement to think about it, before making a decision at the next Board meeting on January 22, 2013. (BOS Video 1/8/2013)

24. On January 22, 2013, the Board of Selectmen voted unanimously "that as of July 1, 2013, the Town will enter into a new lease agreement for (Ms. Swolinzky) to have Lot A."

25. The Board of Selectmen's minutes for the January 22, 2013 meeting are as follows:

"Aquinnah Board of Selectmen

Minutes of Meeting 1/22/2013

Aquinnah Town Hall Selectmen's Mtg Room

Members present: Spencer Booker, Chairman, Jim Newman, Beverly Wright,

Also present: Town Administrator Adam Wilson, Jamie Vanderhoop, Theresa Manning, Chief Randhi Belain, Sgt Paul Manning, Wendy Swolinzky, Vern Welch, Jimmy San Filippo, Barbara Bassett, Moderator Mike Hebert, June Manning, and Town Accountant Margie Spitz.

-The meeting began at 5:05 pm

-1st on the agenda under old business was a review of minutes from the 1- 8 Selectmen's meeting.

-Jim made a motion to accept the minutes from January 8th. Beverly seconded.

The Board voted 3 - 0 in favor. The motion passed.

-Next under old business was a revisit of the proposal from Wendy to have her switch the current Menemsha lot she leases (Lot B) and take over the lot being

vacated by Camille Rose (Lot A). With the change, Lot A's water frontage would increase to 70' and Lot B's would be reduced to 35'. Spencer stated he was in favor of the change and just moving the lot lines. Beverly said she just doesn't want a state agency saying down the road they couldn't make these changes. Wendy said the current site plan was drawn up by Hugh (Taylor) and only the lot owned by Alfred Vanderhoop had been on the original site plan. There was discussion about the Board's decision not to renew Camille's lease, which was for one year, expiring June 30th of this year and the existing shed being sold to Wendy. The lot created would become available to the 1st person on the waiting list. Jim said that was Brian (Vanderhoop), followed by Vern. -Jim made a motion to move the lot line so that Lot B is reduced to 35 feet and increase Lot A to be 69.9 feet. Beverly seconded. There was discussion about notifying Chip about Lot B's availability. Jimmy asked about the commercial fishing license requirement to have one of the lots. The Board voted 3 - 0 in favor. The motion passed. -Beverly made a motion that as of July 1st, 2013, the town will enter into a new lease agreement for Wendy to have Lot A. Jim seconded. The Board voted 3 - 0 in favor. The motion passed."

26. The BOS subsequently met on February 5, 2013. The discussion about the Menemsha lease lots was not listed on their agenda, but was brought up as Other Business by the Harbormaster Brian (Chip) Vanderhoop who was also the first person on the waitlist.
27. Ms Swolinzky did not attend this meeting since it was not previously posted on the agenda for discussion. During this meeting however, the Selectmen were advised that the lots were created in 1992, and never recorded, therefore the Selectmen could change the lots lines and record them.
28. On April 2, 2013 the BOS met again to discuss the issue brought about by Mr. Vanderhoop. The discussion centered on splitting the lengths of Lot A and Lot B. It was continued until April 23, 2013.
29. Based upon the unanimous, January 22, 2013, vote of the Board of Selectmen, Ms. Swolinzky, on April 11, 2013, purchased the shack, dock and pilings from Camille Rose for \$30,000 and received a Bill of Sale.
30. On April 23, 2013, the Board met to reconsider their vote taken on January 22, 2013, which awarded Ms. Swolinzky a lease of Lot A and the full use and access to the "shack" she had recently purchased from Camille Rose.
31. During this meeting, Board member Beverly Wright made a motion to rescind the prior grant of Lot A to Ms. Swolinzky. Two Board members voted to rescind their lease of Lot A to Ms. Swolinzky, while BOS member Mr. Newman abstained. The effect of the vote was to revert to the status quo whereby Lot B would remain leased to Ms. Swolinzky and Lot A would be available to the next person on the "waitlist."

32. Vernon Welch was the next person on the Town's "wait list" for the lease to Lot A. The Town, without justification or legitimacy subsequently awarded the lease of Lot A, as well as the use of the "shack" purchased by the Plaintiff, to Vernon Welch.
33. The minutes from that April 23, 2013 meeting reflect that Board member James Newman raised the issue of "what will happen to (Ms. Swolinsky's) ownership of the (shack)," that she had purchased on April 11, 2013.
34. In the same video recording a person attending the meeting (Mr. Sanfillipo) stated, "she (the Plaintiff) bought it (the shack) prematurely." Immediately after that comment, Board of Selectman Beverly Wright replied, "I can't say that, she bought it (the "shack") on our vote."
35. Ms. Swolinsky contends that Board member Wright rescinded her previous vote in an effort to award use of the shack on Lot A to Vernon Welch because of the personal relationship that Ms. Wright has with Vernon Welch's family.
36. Selectmen Beverly Wright's husband is a first cousin of Berta Welch; Beverly Wright's husband and Ms. Welch are both members of the Wampanoag tribe; additionally Board member Wright has previously worked for Berta Welch; and Beverly Wright regularly socializes with both Berta and Vernon Welch, including events recently held at the "shack."
37. Board members Booker and Newman admitted during subsequent Board of Selectmen meetings that rescission of their January 22, 2013, vote to award the Plaintiff the lease to Lot A would likely put the Plaintiff out of business and that the shack was a "valuable asset."
38. At the same April 23, 2013 meeting, there was discussion about other "shack" owners historically having to remove their buildings from Town owned land when their lease term ended.
39. Board of Selectmen Beverly Wright had a similar issue and was forced to remove her "shack" when her lease expired on a lot located on the Gay Head Cliffs expired. During her deposition Wright testified as follows:
40. Q. Earlier you had made some mention of your knowledge, your personal knowledge, I believe, of having to move one of these shack-type buildings; what were you referring to?
- A. I used to have a lease up at the Gay Head Cliffs and when I no longer had the lease I removed the building.
- Q. Okay. How long did it take you to remove that building?
- A. I don't know.
- Q. It was a couple of years, wasn't it?
- A. I can't even say that. It's such a long time ago I can't remember.
- Q. Did you -- what kind of structure was it?
- A. A wood structure. (*Deposition of Wright*, at pp. 59-60).

41. Not coincidentally, Camille Rose was a Selectmen for the Town of Aquinnah when Ms. Wright was required to give up her lease at the Gay Head Cliffs and remove her shack from that location.

42. On May 21, 2013, Selectmen Beverly Wright asked for a copy of the Plaintiff's Bill of Sale for her purchase of the shack from Ms. Rose. Swolinzky presented a copy and gave it to the Selectmen, who made a copy of their own.

43. On May 28, 2013, the Town of Aquinnah's attorney corresponded with Ms. Swolinzky and acknowledged her ownership of the shack by suggesting that the Plaintiff sell the shack to Vernon Welch. The Plaintiff refused to do so.

44. The Town of Aquinnah was fully aware that Plaintiff's "Book-A-Boat" boat rental business was seasonal and that a significant volume of her business was conducted annually from late Spring to Labor Day.

45. On June 1, 2103, Ms. Swolinzky wrote a letter to the Board of Selectmen entitled, "Request for Extension of Use and Time to Relocate." The Plaintiff's letter stated:

"Since the unresolved timing of the lease lot and my shack has dragged into this working season, I am asking the Board of Selectmen to allow me an extension to use my building through this season. I would also ask for the necessary time to go through the process of securing permits needed to move the building to my lot or building something else on it."

46. Shortly after the Board's vote to award Lot A to Vernon Welch, Ms. Swolinzky filed her original application to remove the "shack" from Lot A to her leased Lot B location. She filed her application with the Planning Board on June 16, 2013. This application to remove the "shack" remained open until June of the following year 2014.

47. Despite Ms. Swolinzky's ongoing application to the Planning Board seeking permission to remove the shack, four days later, on June 20, 2013, Town Administrator Wilson wrote Vernon Welch a letter informing him of the following:

"The Board of Selectmen voted at their June 4th meeting to give you a four year lease for the Aquinnah Menemsha lot "A." (June 20, 2013 Letter)

48. At the next Board of Selectmen meeting held on June 26th, Ms. Swolinzky emphatically stated her intention to remove the shack that she owned from Lot A and to have it placed on Lot B. According to the Board of Selectmen minutes: "Wendy stated that she was ready to have a crane remove the shed off the lot Thursday if she had to." June 26, 2013, Board Meeting Minutes.

49. During this meeting, Selectman Beverly Wright acknowledged in the minutes Ms. Swolinzky's ownership of the shack by stating, "... a 4 decade old understanding between the two towns that the one shed owned by C. Rose (now W. Swolinzky) be assessed by Aquinnah and the other shed owned by J. Mayhew be assessed by Chilmark."

50. On July 29, 2013, despite the fact that Mr. Welch's lease of Lot A and use of the Plaintiff's shack had begun, the Board of Selectmen continued to give Ms. Swolinzky permission to file and apply for permits and licenses for the removal of the shack on Lot A and placement of it on Lot B. Correspondence from Defendant Wright, dated July 29, 2013.
51. Significantly, Ms. Wright who had voted to rescind the award of Lot A to the Plaintiff, also voted "NO" to allow Swolinzky permission to continue with the permit process to remove the shack from Lot A, however, the other BOS members voted to allow the Plaintiff to continue with the permitting process and the Motion passed 2-1.
52. On September 3, 2013, Aquinnah's Board of Selectmen and Aquinnah's Planning Board conducted a joint public meeting for the specific purpose of discussing Plaintiff's "shack," its removal from Lot A to Lot B, and the rights of all lessees of Menemsha lots. (*Deposition of Wright*, at pp. 76-82).
53. As of September 3, 2013, the Board of Selectmen knew that Plaintiff's Planning Board application was not merely pending, but also complex and would become the subject of multiple further permit requirements.
54. Board of Selectman member James Newman is also the Aquinnah Board of Selectmen's representative to the Aquinnah Planning Board and was at all relevant times cognizant of Plaintiff's applications, which remain pending to this date. Mr. Newman was a proactive participant in the joint meeting of the Select and Planning Boards on September 3, 2013.
55. Prior to the September 3, 2013 meeting, the Aquinnah Planning Board Plan Review Committee also held multiple public hearings on July 16, July 23, August 20, all attended by Selectmen Newman, to discuss how to best resolve Plaintiff's ownership and removal of the shack.
56. On November 12, 2013, the Planning Board addressed the issue of Ms. Swolinzky's obtaining permits to move the shack. The Planning Board stated: "A request to continue the applicants hearing to the next scheduled hearing date on February 11, 2014, was voted on and passed. See November 12, 2013 PB hearing minutes.
57. Sometime shortly before the Board of Selectman's meeting of December 3, 2013, and without notice to the Plaintiff or in compliance with Massachusetts' Open Meeting Law, Board of Selectmen Beverly Wright notified the Town Administrator to place an item on the meeting agenda regarding the "status" of Plaintiff's Planning Board permit applications. (*Deposition of Wright*, at pp. 79-81).
58. Selectmen Newman, who had personally attended most of the five (5) previous Planning Board Hearings on Swolinzky's application from June 16 -- November 12, 2013, could and should have informed the other members of the Board of Selectmen regarding the ongoing application status of the plan for the removal of the shack pending before the Planning Board.

59. On December 3, 2013, prior to the next Aquinnah Planning Board meeting, which was scheduled for February 11, 2014, the Board of Selectmen unilaterally and without notice, determined that it was "impractical" to remove the shack from Lot A to Lot B. Aquinnah Board of Selectmen Meeting Minutes for December 3, 2013.
60. No notice pursuant to G. L. Ch. 30A, Section 20(c) was given to Plaintiff or to the public that a taking of the shack on Lot A by the Town was to be considered, let alone acted upon on that date. (*Deposition of Selectman Booker*, at pp. 92-93).
61. At the same December 3, 2013 BOS meeting and just prior to the Defendants' "taking" of the shack, the Aquinnah Selectmen and the Chilmark Selectmen met together to discuss the procedure for moving the preexisting Town line(s) so that Lot A and the Plaintiff's "shack," which was predominantly and previously located in the Town of Chilmark would become completely relocated into the Town of Aquinnah and the Mayhew Lot, predominantly located in Aquinnah, would be located entirely in Chilmark.
62. On December 3, 2013, the Board of Selectmen unlawfully voted to take the shack as Town property, and did so without notice to the Plaintiff or without either Procedural or Substantive Due Process in violation of Plaintiff's rights under both the 4th and 5th Amendments to the United States Constitution and Articles 10, 11, 12 and 14 of the Massachusetts Declaration of Rights.
63. The Town of Aquinnah "took" the shack as their property despite the fact that they knew it was predominately located within the Town of Chilmark.
64. According to the minutes of December 3, 2013, Board of Selectmen's meeting:
- "Jim (Newman) made a motion to reconfirm Vern's rights to Lot A and that the building stays on lot A as Town Owned property. Spencer seconded. The Board voted 2 in favor (Beverly & Jim), 1 against (Spencer). The motion passed. There was discussion about what are the next steps for the shed structure. Beverly (Wright) wanted to have another lock put on the shed and to find out who owned the current lock. There was discussion about the ownership transfer situation between Wendy and Camille Rose. Beverly read an e-mail from Berta Welch that the shed's ownership transfer has not been settled. Beverly said the shed is now the town's.... Wendy came in to the meeting and was told the decision made by the Board. There was discussion about what would happen next. Wendy then left the meeting." Aquinnah Board of Selectmen Meeting Minutes for December 3, 2013.
65. The Aquinnah Planning Board never addressed the possibility or the "practicality" of removing the shack from Lot A to Lot B before the Board of Selectmen voted to take it as Town property on December 3, 2013.
66. Chairman Booker voted against taking the shack from Ms. Swolinzky and subsequently testified that he believed the Town acted inappropriately at the December 3, 2013, meeting:

- Q. You voted not -- you voted against taking the shack from her, didn't you?
 A. I believe I did.
 Q. You thought it was wrong, wouldn't you agree?
 A. I did at the time, yup. Yup...
 Q. Do you believe that the Town acted inappropriately by taking that shack from her? (objection)
 A. At the time, yeah. (PSOF at ¶138). (*Deposition of Booker*, at pp. 99-100).

67. On January 31, 2014, Ms. Rose's ownership of the shack was finally litigated and resolved in her favor. Probate and Family Court Department, Docket No. DU13E-0003-QC.
68. The Agreement for Judgment, which was signed by Defendant Vern Welch's wife, Berta Welch on January 31, 2014, stated with respect to the shack; "For purposes of the Probate of the Estate of Alfred A. Vanderhoop, the Trust acknowledges the authority of Rose, as Personal Representative of the Estate, to sell the shack and waives any claim to the sale proceeds or challenge the Bill of Sale. The Trustees of the Trust hereby agree to allow Rose (individually) to retain any and all past, current or future payments from the sale of the Shack to Swolinzky." Docket No. DU13E-0003-QC.
69. It is important to note that the Vanderhoop Trust Agreement was not fully executed, or signed by Berta Welch and David Giles, two of the named Trustees, until April 23, 2013, one day after the Town rescinded their vote to give Ms. Swolinzky the lease to Lot A and then awarded it to Vern Welch, Berta's husband.
70. On February 5, 2014, in a wrongful attempt and with the intent to justify or explain the Board's misconduct of December 3, 2013, the Board employed Section 17 of a lapsed lease with Camille Rose (lapsed as of June 30, 2013) to take possession of the shack in 2014. Correspondence to W. Swolinzky, dated February 5, 2014.
71. It is important to note that Section 17 of the Town of Aquinnah Lease Agreements states that **Lessees are required to remove their structures** upon completion of the Lease term.
72. The February 5, 2014 letter stated that "The town has concluded that your stated plan for moving the structure is impractical, because of the large number of local and state permits necessary for the undertaking..." Correspondence to Ms. Swolinzky, dated February 5, 2014.
73. Ms. Swolinzky had already retained the services of Vineyard Land Surveying & Engineering, Inc. to determine the "practicality" of moving the "shack." Professional Engineer, Reid G. Silva, determined that "With minimal bracing, and reasonable care the structure will withstand the move to the new location." August 20, 2013, Engineering Letter to Remove the Shack.
74. Although the Board of Selectmen had already taken the shack as Town property at their December 3, 2013 meeting, on February 11, 2014, the Aquinnah Planning Board held a public hearing to further discuss the relocation of Ms. Swolinzky's "shack." It was decided by the Planning Board to allow an extension of Ms. Swolinzky's request until a hearing on

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April 8, 2014. Aquinnah Planning Board Minutes for February 11, 2014.

75. On March 18, 2014, although there was nothing posted on the BOS Agenda for that date's meeting, there was discussion by the Board concerning the changing of locks on the shack. Vernon Welch had requested permission from the Board to cut off the Plaintiff's lock and put on his lock. Selectmen Wright and Newman stated they "didn't have a problem with the request." BOS Minutes of March 18, 2014.
76. As a consequence of the Board's actions, the Plaintiff's property within the "shack" was essentially given over to Mr. Welch.
77. On March 20, 2014, Beverly Wright informed Vernon Welch that the Department of Aquinnah Public Works would be removing Plaintiff's lock on the shed and he could "make whatever improvements necessary..." (March 20, 2014, Letter from Wright to Welch).
78. Ms. Swolinzky was never given the opportunity to remove her property from within the shack. When she went to Aquinnah Town Hall and spoke about it with the Town Administrator, who ordered the Plaintiff to "get out" and slammed the office door in her face.
79. Despite the clear commercial fishing business requirement of the terms of the lease of Lot A, as of the date of this filing, Vernon Welch, whose lease began in July of 2013, does not operate a commercial fishing business and has yet to perform any accepted uses in the marine commercial district, marine or aquaculture related business from the leased premises of Lot "A."
80. Despite the Town's purported rule against "shared usage," Vernon Welch was sharing his usage of Lot "A" with multiple individuals, including individuals he was not related to. (*Deposition of Vernon Welch*, at pp. 43-47, 107-108).
81. According to Mr. Welch, as of July 1, 2013, only 7 months after Camille Rose's lease was not renewed due to an alleged "shared usage" violation, the Town began to allow shared usage of its leased properties, including Mr. Welch's use of Lot A. Welch testified:
- "I think I included everything because, at the time I signed my lease, they were disregarding all the laws down there, the selectmen, and they allowed shared usage and all this stuff. So when I did my business plan, my initial business plan was aquaculture." (*Deposition of Vernon Welch*, at pp. 43-44).
82. Plaintiff has produced additional evidence demonstrating "ownership" of several other structures on the leased land, including the "shack" in question. A copy of a permit provided to one Lynn Murphy for the use and occupancy of an area of land located in Menemsha, at or near the location of the "shack" in question reads as follows:

"Upon termination of this permit or extension thereof, the permittees shall remove any and all structures owned by them located on the premises unless otherwise

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agreed upon by the department at that time." Menemsha Permit, September 26, 1960.

83. These documents clearly demonstrates that the ownership of these "structures," including the shack in question in the instant litigation, was "owned" by the various parties who had previously built them on the leased premises.
84. This language also demonstrates that as of September of 1960, the permittees (including the Plaintiff's predecessors) had the authority to erect structures on the land that was leased to them. The "shack" Plaintiff purchased from Camille Rose had been constructed and placed at its current location prior to the year 1938. Its ownership has been documented and consistent for decades until purchased from Camille Rose by the Plaintiff in 2013.
85. The records of sale (and ownership) of the shack demonstrate that Captain Stephen S. Gardiner bequeathed the shack from the estate of Rebecca A. Gardiner to Dora Fenner, who sold it to Louis B. Shurtleff in 1952. Shurtleff sold it to Alfred A. Vanderhoop in 1975, who bequeathed it to Camille Rose in 1999. Rose sold it to Ms. Swolinzky in 2013.
86. The shack was considered "goods and chattels" as per the bill of sale from Dora Fenner to Louis B. Shurtleff.
87. Neither the Commonwealth of Massachusetts nor the Town of Aquinnah has ever performed any maintenance to any of the personal property, (shacks, docks, pilings) on any of structures located on any of these lease lots. Throughout the history of both the Towns of Aquinnah and Chilmark the Towns have only laid claim to the land beneath the structures.
88. Plaintiff initially filed a civil complaint for breach of contract in Superior Court.
89. The Plaintiff subsequently amended her complaint to include a claim for unconstitutional taking and filed in Federal Court.
90. As a result of the Federal lawsuit, the matter was sent for mediation. On June 13, 2017, an application was filed by the Town of Aquinnah seeking a special permit from the Town's Planning Board to relocate the shack from Lot A to Lot B.
91. The Aquinnah Planning Board Plan Review Committee held a public hearing on the Town's application seeking a special permit to relocate the shack from Lot A to Lot B. The minutes from that meeting are attached hereto as Exhibit A. The relevant portion of those minutes begin at page 3-4.
92. The Aquinnah Planning Board Plan Review Committee once again held a public hearing on the request for a special permit to relocate the shack from Lot A to Lot B on November 8, 2017.
93. A copy of the minutes of that November 8th meeting are attached hereto and incorporated by reference for all purposes. Exhibit B.

94. On or about November 8, 2017, the Aquinnah Planning Board Plan Review Committee issued a decision on the special permit application. The Planning Board denied the relocation of the shack from Lot A to Lot B, but allowed for the construction of a new shack on Lot B.

95. In January 2017, special legislation was signed by the Governor approving a new boundary line on Boathouse Road in the Menemsha Creek area. As a result, the "shack" at issue currently falls within the Town of Aquinnah only. Mass. Acts 2016, Ch. 452. Previously, over 75% of the shack was located in the town of Chilmark.

96. On April 16, 2019, the Federal District Court of Massachusetts issued summary judgment in favor of the defendants instructing the Plaintiff to pursue her claim in Superior Court pursuant to M.G.L. c. 79, § 10, 12 and 14. Mass Declaration of rights

COUNT I

ASSESSMENT OF DAMAGES PURSUANT TO M.G.L. C. 79

97. Plaintiff Wendy Swolinzky repeats and re-alleges each of the preceding paragraphs of the complaint as if set forth herein.

98. The above-described taking by the Town of Aquinnah has deprived the Plaintiff of her property, and the economic benefit that she could derive from the use of the "shack," which were both of great value. The taking of her shack has also otherwise limited and curtailed her ability to efficiently operate her business.

99. The above described taking has hindered the operation of her business and created a hardship in its operation.

100. In accordance with the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts, the Town of Aquinnah was bound to award full and just compensation to her for the injury suffered as a result of its unlawful action.

101. To date, the Plaintiff has not been offered a stated sum of money from the Town of Aquinnah as compensation for the taking of her property, nor has the Defendant offered any specific other arrangement for its use.

102. Plaintiff has been damaged the Defendants violations as describe more fully above and seeks recovery for the damages caused thereby, including attorneys fees and punitive damages.

103. Plaintiff is aggrieved by the failure of the Town of Aquinnah and the Board of Selectmen to award full and just compensation for the taking of her land and property, and demands trial by jury to assess damages according to law.

COUNT 2

**MASSACHUSETTS DECLARATION OF RIGHTS, SECTIONS 10, 11, 14 and 15 AND
RELATED PROVISIONS**

104. Plaintiff Wendy Swolinzky repeats and re-alleges each of the preceding paragraphs of the complaint as if set forth herein and hereby asserts as follows:
105. That the above-described taking of her property by the Town of Aquinnah is in violation of the Massachusetts Declaration of Rights (MDR), sections 10, 11, 14 and 15 and has wrongfully deprived the Plaintiff of her property, and the economic benefit that she could derive from the use of the shack, which were both of great value. The taking of her shack has also otherwise limited and curtailed her ability to efficiently operate her business.
106. The above-described taking by the Defendant Town of Aquinnah has hindered the operation of her Book-A-Boat business and created a hardship in its operation.
107. In accordance with the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts, Articles 10, 11, 14 and 15, the Town of Aquinnah was bound to award full and just compensation to the Plaintiff for the injury suffered as a result of its unlawful action in the taking of her property.
108. To date, the Plaintiff has not been offered a stated sum of money from the Town of Aquinnah as compensation for the taking of her property, nor has the Defendant offered any specific other arrangement for its use.
109. The Plaintiff has been damaged by the Defendant's violations as describe more fully above and seeks recovery for the damages caused thereby, including attorneys fees and punitive damages.
110. Plaintiff is aggrieved by the failure of the Town of Aquinnah and the Board of Selectmen to award full and just compensation for the taking of her land and property, and demands trial by jury to assess damages according to law, MDR Article 15

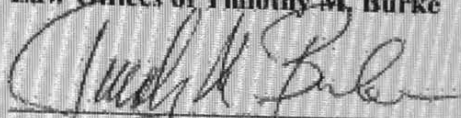
PRAYERS FOR RELIEF

WHEREFORE, the Plaintiffs prays

1. As to each Count, that the Court determine the amount of monetary and equitable damages to which the Plaintiff is entitled as a result of the Town of Aquinnah's taking of her property and the economic benefit from the use of such property;
2. For such other and further relief as the Court may deem appropriate and just, including, but not limited to, interest on any award of damages pursuant to M.G.L. c. 79, § 37, and costs pursuant to M.G.L. c. 79, § 38.

3. That this Court order the return of the "shack" to Plaintiff, and/or award her the use of Lot A and allow her its use since the Town will not permit her to relocate it to her Lot B, with associated costs as stated above.

Respectfully submitted,
For the Plaintiff,
By her attorney,
Law Offices of Timothy M. Burke



Timothy M. Burke, BBO #065720
160 Gould Street, Suite 100
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(781) 455-0707
tburke@timburkelaw.com

Dated: July 17, 2019

Exhibit A

Aquinnah Planning Board Plan Review Committee Meeting August 8, 2017

Members Present: Peter Temple, Chaleman, Jim Wallen, Sarah Thellin, Jim Mahoney, Berta Welch, Isaac Taylor, Jo Ann Becker

Members Not Present: Jim Newman

Others Present: Marilyn Yukota, Paul Gombos, Meghan Gombos, Reid Silva, Meredith Holdsworth, Wendy Swollinsky, Chris Murphy, Jonathan Mayhew, Vernon Welch, Tom Shockey, Philip Rogan, Kris Moriuchi, Joan Hughes

Meeting opened at 6:40 pm.

First on the agenda was the review of the June 7th minutes. Sarah made a motion to approve June 7th minutes as presented. Jim M seconded. The PBPRC voted 4-0-1, the motion passed.

PBPRC reviewed a request from George Saurati to extend a special permit for Carla Theodore at 4 Harpoon Hollow Map 5 Lot 145 dated June 29, 2017. This Special Permit was set to expire on August 4, 2017. Being that the PBPRC did not meet in July and the August 8th meeting would exceed the expiration date, Peter reviewed the bylaws to see if the permit could still be extended. Peter informed everyone that section 6.4-2 of the bylaw states that if the request to extend is in before the expiration date the PBPRC has up to 45 days to approve even if that goes past the date of expiration, Peter had checked with Town Counsel and they confirmed. Saurati had informed Peter that there are no changes to the plan. Sarah made a motion to approve the extension of the Special Permit for 4 Harpoon Hollow Map 5 Lot 145 by 1-year pursuant to section 6.4-2 of the Aquinnah Zoning Bylaws. Berta seconded. The motion passed unanimously.

PBPRC reviewed a request to amend the Special Permit for Slatas at 7 Meadow Way Map 5 Lot 20.5 to convert an existing dwelling to an accessory apartment. Peter reminded everyone that the special permit granted to Slatas included the condition that the kitchen in the detached dwelling be removed. Within the time since approving the special permit, Town bylaws changed to permit accessory apartments with special terms and conditions. PBPRC determined that the request was too significant of an amendment and that it would require a public hearing. Sarah made a motion determining that the request submitted by Slatas to convert the existing dwelling into an accessory apartment is a significant amendment to his plan and requires a public hearing. Jim M seconded. The motion passed unanimously.

Peter opened the following Public Hearing at 6:45pm: Paul Gombos 9 Old Field Road Map 10 Lot 61.1 for Special Permits under sections 3.3-5, 13.4-7 to construct and maintain an accessory apartment where total footprint on a lot will exceed 2000 sf

Peter reminded everyone that this was a continuation hearing and that at the May 2nd hearing the PBPRC had discussed the request for an intensive archaeological survey to be completed and an approval from the Conservation Commission. Peter asked if a letter from MHC had been received to which the answer was no. Meghan Gombos had received email confirmation from PAL stating that no further survey was needed and the recommendation was to continue with the project. A final draft of the findings has been sent to MHC. Discussion took place on the timeline of receiving a MHC letter and the building permit process. The applicant would not be granted a building permit without a positive MHC letter. Peter determined that the special permit be subject to a satisfactory letter from MHC determining that no further archaeological work would be necessary. Peter asked if there was anything else that Gombos wanted to discuss. Gombos requested to change the height of the building from 21 1/2 ft. to 22 1/2 ft. in the case that ground water is hit during construction of the foundation. PBPRC discussed the request and determined that the change would not be approved, however, if the situation arises where ground water was hit, they would try to work with the applicant on an emergency basis. Jim M stated that it is best to stick with the application that has been presented. Berta stated that a foot in height can be a significant change to the neighbors and that they would have to be notified. Peter entertained a motion to approve a special permit for the project as presented conditioned upon receipt of the email from PAL to the applicant stating that no further archaeological survey is required and that the recommendation to MHC is to continue with the project and that upon receipt of a letter from MHC confirming that no further archaeological work is required there is no further determination to such affect required from PBPRC and the applicant may apply for

their building permit directly if all conditions are met. Motion was moved by Jim M, seconded by Sarah. The motion passed unanimously.

Public meeting – Dipietro 5 Sunset Lane Map 6 Lot 105.2 for review of a landscaping plan and MHC findings. Beets was recused.

Discussion took place on whether there was a quorum for a vote, if needed, being that there were only 4 Board members that could continue voting on the project; Sarah had previously voted in opposition to the Dipietro Special Permit. Peter stated that the Special Permit granted is only valid if the next step of the process, the landscape plan, is approved. Discussion took place on what constitutes a quorum for the PBPRC.

Jo Ann arrived at 7:14pm making a voting quorum for the Dipietro meeting.

Peter formally opened the meeting with a reminder that a Special Permit has been approved including conditions subject to MHC findings and a landscape review being that the location of the Dipietro site is highly visible. Reid Silva, Vineyard Land Surveying and Engineering, updated the Board on the MHC findings. He stated that there is no further survey needed for the site, however, given the history of the current building on the site, MHC recommended that the Aquinnah Wampanoag Tribe be consulted prior to demolition. Reid has contacted Bettina Washington, Tribal Historic Preservation Officer of the Tribe, and she has expressed interest in photos of the interior of the current building. Bettina was to write a letter, addressed to the PBPRC, explaining her interest. Reid was to be copied on that letter and he has yet to receive anything from Bettina. Reid will be following up with Bettina. Peter asked what the PBPRC would need for a resolution. Reid assumed there would be two letters from the Tribe one requesting photos of the building and a second letter confirming that photos had been received. With no further discussion, the Board continued onto the review the landscape design.

Kels Horiechi, landscape design consultant to Hukker, presented the PBPRC with a draft of the landscape design for the site. The design included 3-proposed areas for tree groupings in areas that Hukker had identified as vantage points and would provide screening and filtering of the structure. The design also proposed under story planting of native vegetation such as beach plum, blueberry, bayberry and a ground story palate of sweet fern, bayberry and low bush blueberry. The design idea is to create full texture and layering of native material and to treat the site as a native plant habitat. Hukker felt that beechbung would be the best tree to accommodate the weather elements as well as provided the shading the PBPRC has asked for. Within the 3-proposed tree groupings, the beechbung would be planted with other vegetation to create a layering of native plants. The PBPRC expressed concerns of visibility during the winter season. Isaac suggested to add evergreen to aid in screening and developing the beechbung. Because the site is significant, the PBPRC asked to review the photos of the site again. Based on reviewing the vantage point photos, a lengthy discussion took place on the location of the clumping of trees and whether more were needed to screen the structure. Philip Kegan discussed the berm that will be filled in to the level the grade. The berm will aid in minimizing visual western side of the structure. Philip presented the PBPRC with the materials that will make up the new structure. The materials will mimic the natural coloring of the landscape including browns, greys and black palates. Philip felt that the new structure will stand out less. Hukker is considering grey zinc coated copper for the roof which will complement the natural coloring of the landscape and not be as visible as other structures. Windows will be custom and most likely a mahogany grain and will be sensitive to glare and reflection. The siding material will be a combination of grey and brown and the foundation will be a cement grey board form. A lengthy discussion took place on whether the landscape design was sufficient enough for screening the structure and whether year-round screening needed to be incorporated into the design. The PBPRC discussed what would be needed to continue to the next step for Dipietro. Being that there are multiple vantage points of the site and the location is sensitive year-round, the PBPRC requested Hukker to re-work the location of the tree clumps with consideration of the primary vantage points and abutter's view easements. Hukker was also asked to generate a photo with an overlay of the current structure and new structure. Peter asked that at the next site visit that poles be constructed in the location of the tree clumps to get a better sense of the location and screening. Peter entertained a motion to schedule the next Planning Board Plan Review Committee meeting for September 12, 2017 and to continue the Dipietro public meeting on September 12th at 6:30 with a site visit at 6:00. Motion was moved by Jim W, seconded by Isaac. The PBPRC voted 5-0-1. The motion passed.

Peter opened the following Public Hearing: Haldenworth 383 State Road map 8 Lot 139 for Special Permits under sections 13.4-3, 13.4-4 & 13.4-11A to construct an addition and extend the roof line on a preexisting nonconforming structure.

Peter informed everyone that this site is nonconforming but the use of the structure has been approved as a residence. Meredith Haldenworth came before the PBPRC to present plans for a 12' X 11' extension on cement footings and in addition, plans to raise the roof line of the current structure to 18" which is the maximum ridge height allowed for the Roadside DCPC. The current structure would be increased from 320sf to 505sf. The plans included a second story screened in porch on top of the extension that would only measure half of the first floor. Due to the location of the easement on the site, the proposed plan includes a small diagonal dock off the expansion and would be considered as the entrance to the structure as well as housing for the water pressure tank. The PBPRC also discussed the location of the shed and relocation of the parking area. After further review of plot lines, the PBPRC and applicant decided on a location of the shed that was sited is not visible and adheres to property line and wetland setbacks. The applicant also informed the PBPRC of plans to bury the utility lines that are currently in the air. The PBPRC determined that the additions and expansion in terms height of the structure is no more detrimental to the neighborhood than the existing nonconforming structure. Peter entertained a motion to approve the plans as presented subject to the following conditions: applicant must submit amended and certified plot plan and elevation; subject to the orders of conditions set by the Conservation Commission; all exterior lighting must comply with the Towns Exterior Bylaw; all trim must be of natural materials and/or neutral colors; and any changes made in presented plan must come back to the PBPRC for further review. Motion was moved by Jim M and seconded by Sarah. The motion passed unanimously.

Peter opened the following Public Hearing: Miller 63 Hebrews Way map 12 lot 41 for Special Permits under sections 11.3-1, 13.4-1, 13.4-7 to construct a 503sf addition to an existing structure where total footprint on a lot will exceed 2000sf in the Moschip Trail District.

Joan Hughes came before the PBPRC to present plans for a 525sf addition to the back the existing structure. The addition would include a 4th bedroom, 3rd bathroom and a small study. The plans also proposed a new septic system to accommodate the 4th bedroom. Joan informed the PBPRC that the addition would have a four pitch roof and solar panels which would not be visible. The PBPRC determined that no further archeological survey is needed because the addition is sited on disturbed soils and because the location of the proposed new septic system had already been included in the original archeological survey. The PBPRC also found that the addition will not be visible and is behind the mass of the existing building. Peter entertained a motion to approve the project as presented which would include a special permit for the siting of an addition on a lot where there will be more that 2000sf of structure and the siting of solar panels on the addition subject to the following conditions: subject to the orders of conditions set by the Conservation Commission; all exterior lighting must comply with the Towns Exterior Bylaw; all trim must be of natural materials and/or neutral colors; and any changes made in presented plan must come back to the PBPRC for further review. Motion was moved by Jim W and seconded by Jo Ann. The motion passed unanimously.

Peter opened the following Public Hearing: The Town of Aquinash and Wendy Swolinsky, lease of lot "B", Map 3 lot 34.6 under sections 2.4-1A,B,C,D & 10.1-3 for the relocation of a preexisting nonconforming structure located on lot "A" to lot "B" (as shown on a Plan of Lateral Lots, Guy Head (Menemsha) Mass. 7 July 1992) in the Marine Commercial Coastal District. Berta was recused.

Peter informed the PBPRC about the current situation regarding the submitted application. Peter had spoken with Town Counsel and according to the confidential mediation with the Town, the Swolinsky Party and the Welch Party, an agreement has not completely been reached. Peter relayed that Town Counsel had felt that this hearing should not only be a question of moving the existing shack on Lot "A" to Lot "B" but also the construction of a new shack on Lot "A" in place of the existing structure. In effect, the notice of this hearing is incorrect and the Town does not want to apply for a special permit without both the movement of the shack and construction of a new shack. Peter felt it best to open the hearing to review the materials that had been prepared so far and to make sure that when the PBPRC does hear the application in full at the next meeting that all the documents needed are going to be prepared thus making it a smoother and easier deliberation for the PBPRC and all parties involved. Peter also felt that the real goal of this hearing should be to start the proper advertisement and notice for the next hearing.

Sophia stated that she had filed a Disclosure of Financial Interest based on her relation to one of the parties involved in the application but felt that she could continue her job without it being a conflict of interest. The PBPRC agreed that because Sophia is not a voting member that there wouldn't be a conflict of interest but acknowledged that the proper forms have been filed.

Peter proposed to review which permits/determinations were required by zoning in reviewing the project. Discussion took place on the age of the shack and whether the MV Commission should be notified and if the DRI checklist needed to be referenced. Discussion also took place on the ability for the shack to be moved. Reid informed the PBPRC that the engineering had already been done for the shack and it is structurally sound to be moved. Peter noted that there are many levels of approval required for this application and it partly depends on where the PBPRC approves for siting. Reid questioned whether zoning in the district would allow for more than one structure on those lots being that all the Aquinnah Menemsha leases sit on the same lot. A brief discussion took place concerning the new Menemsha lot line. Reid felt that the PBPRC should be looking whether this application is acceptable to the town for the siting area.

A lengthy discussion took place on the following identified issues with the Menemsha lease lots and the application: history and age of the shack on Lot "A" (MV Commission and DRI Checklist), structural soundness of shack, parking for lease holders and lack thereof, Menemsha Creek agreement, and the MA State intent of Menemsha lot leases. Jim M felt that Town Counsel should be present and involved in the discussion and for that reason no decision should be made. The PBPRC asked for a copy of the Menemsha Creek Agreement between Chilmark and Aquinnah.

Reid presented the plans to the PBPRC on behalf of the Town. He noted that there hasn't been a discussion on whether Vernon would be replacing the existing dock but that the proposed building replacing the shack is about the same measurements as the one being moved, those measurements being 12'4" x 16'6" with a height of 12". The PBPRC asked whether the pilings could be moved. Reid felt that they are fine where they are now but if they were to be moved that they would fall apart. Four new pilings would need to be constructed to hold the shack on Lot "B" and would possibly require movement of boulders for the pilings to fit. Discussion took place on placement of the pilings, cost and minimizing impact. Reid stated that, assuming the use aspect of this district is consistent with what has been approved, then approval of the permit it is ultimately left to location and size of the structures and that there isn't much variation. A discussion took place on whether the shacks could be reconfigured to allow for more parking. Peter reviewed the zoning restrictions for the Marine Commercial District and the new FEMA restrictions. Reid stated that the application meets FEMA requirements and would comply with all the conditions. In meeting those special requirements, the PBPRC would be able to approve a special permit for the moving of the shack and the construction of its replacement. Peter asked if there was any more questions or concerns. Hearing none, Reid, on behalf of the Town, withdrew the application. The PBPRC, by consensus, agreed to schedule a separate hearing when the Town submits a corrected application.

Meeting adjourned at 10:25pm.

Respectfully submitted,

Sophia Welch

Board Administrative Assistant

Exhibit B

**Aquinnah Planning Board Plan Review Committee
Meeting November 8, 2017**

Members Present: Peter Temple, Chairman, Jim Wallen, Sarah Thulin, Jim Mahoney, Jo Ann Eccher, Isaac Taylor, Berta Welch and Jim Newman

Others Present: Town Administrator Jeffrey Madison, Vernon Welch, Carla Cuch, Adriana Ignacio, Reid Silva, Wendy Swolinsky, Tim Burke, Micheal Stutz

Meeting begun at 6:38 pm.

Prior to opening the hearing, discussion was had on whether there was a quorum for the hearing. Berta and Jim N. were recused due to conflict. Discussion was had on whether Isaac was in conflict. Being that his father is a lease holder of a Menemsha lease lot, the potential for Isaac having a direct financial gain in the decision was discussed. The PBPRC determined that even if Isaac did not sit for the hearing, there were 5 members to make quorum. The PBPRC discussed whether a decision was going to be made within one meeting. The interested parties in the application stated that they did not have an issue with Isaac sitting on the Committee for the hearing if he felt he did not have a conflict of interest. Ultimately, the Committee felt that because a decision most likely was not going to be made within one meeting, Isaac could sit for the meeting and follow up with the State Ethics Committee to get a final determination and if an issue is determined he would not vote on the decision at the

continued hearing. Jim W disclosed for the record that he and Wendy Swolinsky work in the same real estate office, but they do not make any financial benefit off each other and are independent agents.

Peter informed the Committee of another potential issue that could delay a decision being made. At the site visit, there was a question about the height restrictions in the Marine Commercial District. Town Council was not able to give an answer and is not clear yet if there is a height issue. If there is, the Committee could not address it tonight but could approve a special permit subject to an opinion from Council on height. In the Coastal District, house height is determined from the base flood elevation. In Menemsha, the flood elevation is measured at 12ft. However, the Committee found that Menemsha is exempt from the Coastal District bylaws. In addition, the bylaws state that if the structure is out in the open it cannot be higher than 18ft. Reid informed the Committee that if height is measured from mean average grade then relocating the existing structure would not meet the height ridge height limit of 18ft unless the special permit allowed up to 24ft, which the Committee can approve. Based on this finding, the Committee continued the meeting by opening the hearing.

PBPRC opened a hearing to act upon a request for Special Permits from The Town of Aquinnah of Boathouse Road Map 3 lot 34 under sections 2.3, 2.4-1, 10.2, 13.4- 1 and 13.4-11 of the Aquinnah Zoning Bylaw for the relocation

of a preexisting nonconforming structure located on Lot "A" to lot "B" (as shown on a Plan of Lease Lots, Gay Head (Menemsha) Mass. 7 July 1992), construction of piles and decking on Lot "B" and re-construction of a new structure on Lot "A" in the flood plain and the Marine Commercial District. The Committee found the following

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issues that needed to be addressed:

1. Whether it is an allowable use to have more than one structure on the lot and in the proposed location where the structures are sited within the flood plain. ☐
2. Whether the siting of the structure would meet the requirements for a special permit for structures located in the flood plain. ☐
3. Whether the structures meet the design guidelines, fit the character of the neighborhood and are otherwise appropriate. ☐

In addition, the Committee found that there could be potential issues concerning the historical nature of the pre-existing non-conforming structure on Lot A. Where there is no Historical Commission for the Town certain zoning bylaws do address maintaining the character of the

Town. The Committee found that no other applications had been submitted to the Army Corp of Engineers or other State Committees for the proposed project.

Reid Silva presented the plans to the Committee. The proposed project is to relocate the existing structure on Lot A to Lot B and a construct an identical structure on Lot A to replace what was there. The new construction would be designed based on the idea of two sister buildings in which the new construction would be of similar materials and dimensions to that of the pre-existing structure located on Lot A. The Committee found that the Lot is within the Flood Plain and Velocity Zone and would require a special permit for new construction where new construction is located landward of mean high tide. In addition, the Committee found that the current structure on Lot A is lower than the Flood Plain (the flood plain is 12 ft and the deck on Lot A is 5.3 ft). If in moving the structure to Lot B and was located above the Flood Plain, the structure would sit 4' higher than the road. To avoid this, the proposed plan would be to reconstruct the deck at an elevation of 7 which would be 1' lower than the road. This led to a conversation on height restriction for the area. The Committee found that while the structure's height is 16'3" and under the 18' maximum in an open and highly visible area, if relocated to Lot B and placed in the Flood Plain at an elevation of 7', the ridge height of the structure would measure to be 23'3" above mean average grade. A Special Permit would need to be

granted to allow for a maximum height of 24'. The PBPRC found that given the actual height of the structure and the siting next to the road at the same level as other structures in the neighborhood, it would not look over height to passerby, and should be allowed as long as the height does not exceed 24' above grade. In addition, if the Committee permitted the structure to go to 24', Counsel's opinion would not be needed.

Continuing the discussion on the Flood Plain and Velocity Zone, the Committee found that if the structure were to be relocated from Lot A to Lot B, it would need to be modified to meet Velocity Zone building codes, which would include breakaway walls. This led to the discussion of the historical value of the existing structure and if it was structurally sound to be moved. In addition, a discussion was had on whether making major changes to the structure and bringing it to code with

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breakaway walls would change the building from a historical perspective. Reid noted that the structure can move without being damaged and that the building would not undergo any demolition to be brought to code if moved to Lot B. Peter read the following from the MVC policy for DRI review concerning demolition "demolition of any structure that has been identified as having historical significance by a local historic commission or architectural commission, by general plan of the Town,

by the Massachusetts Historical Commission, or listed with the National Massachusetts Register of Historical Places; or was constructed before January 1, 1900 – with MVC Concurrence.” Jo Ann read a portion of an article from the Martha’s Vineyard Gazette dated April 17th, 2014 stating that the “the 240sf shack was built around 1865 and sits at the head of the harbor on Boathouse Road ... It is the oldest Menemsha fishing shack, surviving the hurricane of 1938.” While Swolinsky stated that in her research she could only date the shack back to the late 1920’s. Although its age could not be determined, and there was some evidence that it may be over 100 years old, the Committee found that referral to MVC would not be required because even if the structure would be significantly modified if relocated (brought up to code with breakaway walls) it would not be demolished, which is the MVC DRI trigger.

The Committee found, based on all of the above, that the siting of a new structure on Lot B met the requirements for siting a building in the Flood Plain and Velocity Zone listed in bylaw sections 10.2-2C, 10.2-3 and 10.2-4.

The Committee discussed the issue of use within the Marine Commercial District. Reference was made to the Menemsha Lease Agreement between the Town of Aquinnah and Chilmark. Ultimately, the Committee determined that the agreement was outside of their zoning purview and found that within the Marine Commercial District, the addition of a second structure, or even more,

is consistent with the goals of the District which is to provide jobs and income to Town residents. The Committee found that, for zoning purposes, the lease lots are recognized as one lot and there is no limit on density in the Marine Commercial District, except when an application is requesting for the total footprint to exceed 2,000sf. The Committee found that the structure on Lot A, including decks, is 578sf and that if the existing structure were to be relocated to Lot B the footprint of that Lot would increase to 529sf including 197sf of deck and 64sf of ramp. The new structure built on Lot A would replace the same footprint (578sf) that was there and therefore, the 2,000sf restriction would not apply to this application.

In reviewing the siting and setbacks of the plan, the Committee determined that relocating the existing structure to Lot B, it would be sited equally distant from the lease lot lines and there would be sufficient space between the road and the structure so that it wouldn't obstruct the flow of traffic. Although the relocated structure on Lot B and the new structure on Lot A would be sited within 30' of the property line and within 40' of the centerline of the road due to the topography of the lot, the Committee would be able to grant a Special Permit if the sitting is in harmony with the goals of the bylaws. The Committee found that the sitting is consistent with setbacks in, and the character of, the neighborhood and meets the

goals of the bylaw for maintaining the character of the Town and should be allowed.

The Committee opened the meeting to the public and took questions from the floor. Tim Burke, Swolinsky's attorney, questioned the length of time to acquire permits from ConCom, State Committees and the Army Corp of Engineers. Reid stated that the licensure could take up to a year and the whole process, if permits are in order within the next three months, could take up to a year and a half before beginning construction. Burke then asked what was to prevent the Town of Chilmark from negating the decision made by the PBPRC. The Committee informed everyone that Chilmark officials and abutters were notified of the hearing and that there is a 20- day appeal period which begins when the permit is filed with the Town Clerk.

There was further discussion concerning the height and calculation of the mean average grade and how the mean average grade was calculated. There was discussion concerning whether an archeological survey had been conducted. Reid stated that a project notification form had not been filed with MHC but that one could be. The Committee noted that every project that disturbs the ground by way of excavation requires a referral to MHC. Reid informed the Committee that grade beam would be on the inside of the shore and on Town land, where on the

shore side, piles would be driven. However, the shore side is State land because it is land below mean and below water. The Committee felt that the argument that it is not Town land would be sufficient enough to not require a survey because the land is not within their jurisdiction.

Sarah, the Conservation Commission appointee to the PBPRC, expressed concerns with moving the structure from Lot A to Lot B and re-building on Lot A and the impact it would have. She further discussed how moving the structure over and building a new structure on the same site where a structure already exists seems more complicated than just building a new structure on Lot B and leaving the pre-existing structure on Lot A. In addition, she voiced her concerns regarding the disturbance to the resource area if the structure on Lot A were to be relocated. However, the Chair noted that her concern of disturbance was not within the PBPRC purview and more within ConCom's jurisdiction.

Discussion took place on the advertisement and the application. Peter read the application for the record. After a discussion and review of the application and advertisement, the Committee felt that the application had conflicting language. While the ad did not read "to reconstruct or construct a new building on Lot B", which is what the applicant was requesting, the Committee did not deem it significant enough change for re-advertisement. In addition, the Committee found that the applicant was only requesting to relocate the structure on

Lot A and not the deck or pilings on the Lot. Sarah made a motion to approve the building of a new structure on Lease Lot B. The motion was not seconded.

The issue of whether Isaac had a conflict of issue was discussed again along with how to make a logical decision on the application before the Committee. Berta Welch stood and stated she felt that there was much ambiguity with Isaac sitting

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throughout the hearing while adding his opinions, when normally if there are any feelings of conflict of interest for a member in a hearing, the Committee asks that member to recuse themselves and not try to sway the Committee in any way. Isaac recused himself.

After further discussion on the historical nature of the structure and the DCPC guidelines and strong opinions voiced from Committee members on what the least impact on the site would be, the PBPRC could not reach an agreement on the risks and wisdom of relocating and significantly modifying the existing shack given its historical significance, so the applicant requested to amend the application such that the existing structure would remain on Lot A and that an identical new structure be constructed on Lot B. Peter entertained a motion to approve the plans presented showing two buildings on the Lot with the condition that the structure

on Lease Lot A remains on that lot along with all the pilings and deck and a new building of the same size be approved to be built on Lease Lot B conditioned upon the following: subject to the orders and conditions set by the Conservation Commission, subject to all State approvals and approval from the Army Corp. of Engineers, the height of the new structure on Lease Lot A is not to exceed 24', footprint and visual appearance of the new structure shall be identical to the existing structure on Lease Lot A, all trim must be of natural materials and/or neutral colors, no white paint, all exterior lighting will comply with the Town's Exterior Lighting Bylaw, no skylights, subject to the submission and PBPRC approval of architectural drawings/elevations of the new structure. Motion was moved by Sarah and seconded by Jim M.

The PBPRC voted 5-0. The motion passed. A Special Permit for the following was granted: special permit for the height over 18' in an open and highly visible area, not to exceed 24', special permit for the construction of a new structure on a municipal lot with a setback of 16.4' from the property line and 14.9' from the centerline of a road, special permit for the siting of the structure on the lot, and a special permit for construction and siting of a new structure on the Flood Plain and in a Velocity Zone (Flood Plain Permit).

Meeting adjourned at 9:26 pm.

*Respectfully submitted, Sophia Welch Board
Administrative Assistant*